

STATE OF MAINE

BEFORE THE JUSTICES
OF THE SUPREME JUDICIAL COURT
DOCKET NO. OJ-17-1

In the Matter of
Request for Opinion of the Justices

REPLY BRIEF OF FAIRVOTE

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ARGUMENT

On March 3, eleven organizations and individuals filed briefs pursuant to this Court’s Procedural Order. The briefs filed in support of “An Act to Establish Ranked-choice Voting” (the “Act”) show that a solemn occasion is not present and that—consistent with the appropriate standard of review and the deference afforded to popularly enacted legislation—the Act can be upheld under a reasonable reading of the Maine Constitution. Notably, respected and independent scholars of Maine history and constitutional law, Marshall J. Tinkle and Professor Dmitry Bam, concur with this conclusion. The briefs filed in opposition, on the other hand, ask the Justices to abandon judicial deference,¹ to ignore the proper standard of review,² and to mischaracterize³ and then denounce this duly enacted citizen initiative.

¹ The Senate, for example, asks the Justices to impose a restrictive definition of the word “vote” rather than adopting any reasonable reading of the word “vote” that would honor the will of the people. *Compare* Br. of Senate, at 22, *with* Br. of FairVote, at 7. As FairVote has demonstrated, a broad definition of “vote” is not only deferential—it is more historically accurate. *See id.* at 7-9; *Dudum v. Arntz*, 640 F.3d 1098, 1103 (9th Cir. 2011) (noting that RCV was “developed in the 1870s . . . [and has] been used in the United States and elsewhere at various times since then”).

² The House Republican Caucus and Maine Heritage Policy Center argue that the Constitution “implies” that the candidate who receives the most first-preference rankings must be declared the winner, rather than the candidate who receives the most votes after tabulation is complete. *See* Br. of Maine House Republican Caucus & Maine Heritage Policy Center [hereinafter, “Caucus”], at 7. This turns the presumption of constitutionality on its head. The Court does not strike down enacted laws whenever a conflicting interpretation is *possible*; rather, the Court starts with the goal of honoring the popular will and must resolve all reasonable doubts in favor of the Act’s constitutionality. *See Godbout v. WLB Holding, Inc.*, 997 A.2d 92, 94 (Me. 2010).

³ The Caucus, among others, attempts to portray each tabulation round as a separate election and each preference ranking as a separate “vote,” as if RCV involves multiple elections and multiple rounds of “voting.” *See, e.g.,* Br. of Caucus, at 8, 10, 15. But, of course, the voters did not adopt a runoff system—they adopted RCV. RCV involves one election, with each voter getting one vote. That vote conveys more *information* than a single-choice ballot, but it is still one vote. The Caucus’ “analogy [to a runoff system] is just that—an analogy.” *Dudum*, 640 F.3d at 1107 (contrasting an RCV system, in which

The reply briefs filed in support of the Act today further demonstrate why a solemn occasion is not present and why the Act should be upheld on the merits. FairVote supports and joins these arguments. Given its experience working with jurisdictions around the country on implementing ranked-choice voting (“RCV”), FairVote files this reply brief to address misperceptions about election procedures contained in the opposition briefs. In particular, a range of implementation options is available, and each option complies with the Constitution’s procedural requirements. As long as local officials are charged with conducting and publishing local counts and the Secretary of State’s (the “Secretary’s”) role remains ministerial, all of these options should survive. The Act does not conflict with these requirements, can be executed under procedures and statutes that are *already in place*, and in any event can be implemented using more rigorous methods if existing procedures are considered insufficient.

I. The Legislature has the power to establish election procedures that are consistent with the Maine Constitution.

As a matter of constitutional first principles, the Legislature has the power to establish—and the Executive has the power to implement—any election procedure

voters “are afforded a single and equal opportunity to express their preferences for candidates,” with a runoff system, which “involves at least two rounds of voting, or *inputs*”).

The Caucus also alleges that “the Act eliminates the possibility of a minority winner and imposes a majority requirement.” *See* Br. of Caucus, at 9. That is false. The Act does not *require* a candidate to receive more than 50% of the vote, and the RCV process only *guarantees* an outcome above 50% when all voters are required to rank every candidate in order for their ballots to count. Because Maine voters may select a single candidate and their ballots will still count, a candidate may prevail “regardless of whether she or he obtains a majority.” *Id.* at 6-7. Maine’s choice to use RCV simply means that multi-candidate races will result in majority outcomes *more often* than they currently do.

that reasonably complies with the Maine Constitution. *See Maine Milk Producers, Inc. v. Comm'r of Agric.*, 483 A.2d 1213, 1218 (Me. 1984) (holding that challengers “must prove that no logical construction can be given to the words of the . . . Act that will make it constitutional”). Opponents of the Act contend this foundational tenet was altered when a provision regarding elections was removed in 1864.⁴ Yet, whatever the reason for that change—and none was provided—a similar provision was added as a replacement a mere six years later.⁵

Moreover, this Court has long recognized these provisions should be given “a liberal interpretation in order to carry out their broad purpose,” *Allen v. Quinn*, 459 A.2d 1098, 1102 (Me. 1983), rather than a rigid reading that raises archaic hurdles. Their purpose is to prevent “fraud or mistake” and “correctly to ascertain and declare the will of the people,” *Opinion of the Justices*, 70 Me. 560, 561 (1879), not to erect arbitrary obstacles to obtaining that result, *see id.* at 563-64.

For example, the Constitution states that the Secretary should receive the “lists” (election returns) and that the summoning and declaring of winners be done from these “lists.”⁶ Yet, the Secretary has long been authorized by statute to

⁴ *See* Br. of Caucus, at 13-14 (noting removal of a provision that “the Legislature may prescribe a different mode of returning, examining and ascertaining the election of the representatives” (citing Me. Const. art. IV, pt. 1, § 5 (1820))).

⁵ *See* Br. of Marshall J. Tinkle, at 17-18 (noting that the original provision disappeared “for reasons unknown” and that a provision was added in 1870 authorizing the Legislature to “prescribe the manner in which the votes shall be received, counted, and the result of the election declared” (citing Me. Const. art. IX, § 12)).

⁶ *See* Me. Const. Art. IV, pt. 1, § 5; *id.* art. V, pt. 1, § 3; *Opinion of the Justices*, 815 A.2d 791, 797 n.1 (Me. 2002) (noting that the “lists of votes” refers to the “election returns” prepared by local election officials). *See also* Br. of Attorney Gen., at 6.

tabulate election results, 21-A M.R.S. § 722, and the Justices have upheld using this *tabulation* as the basis for official duties, *see Opinion of the Justices*, 2002 ME 169, 815 A.2d 791, 798-99 (Me. 2002). As the Deputy Secretary of State attests, this “tabulation is in the form of a spreadsheet that aggregates the vote totals for each candidate.” *Flynn Aff.* ¶ 15.

Most House districts, all Senate districts, and the Governor’s race all span multiple localities and require *central* tabulation *before* the candidate with the most votes can be determined. *Id.* ¶ 16. The Governor then issues a summons “[b]ased on a review of *the tabulation*,” and “the Secretary presents the *tabulation* . . . to the Senate and House.” *Id.* ¶¶ 17, 18 (emphasis added). This modernized procedure has been permitted under a “liberal interpretation” of the constitutional provisions at issue because it helps “carry out their broad purpose.” *Allen*, 459 A.2d at 1102. A more rigid interpretation would mean that a constitutionally compliant election has not been held in more than 60 years. *See* R.S. ch. 3-A, § 122 (1954).

The “sort, count and declare” provisions also prevent “fraud or mistake” by placing local officials in charge of counting and publishing local results in “open meeting.”⁷ These provisions do *not* require that ballots be counted by hand (90% of ballots are already counted by optical scanner),⁸ that the “open meeting” be held in the same municipality from which the voters hail (counting already occurs

⁷ *See* Me. Const. art. IV, pt. 1, § 5; *id.* pt. 2, § 3; *id.* art. V, pt. 1, § 3.

⁸ *Flynn Aff.* ¶ 7.

outside of some municipalities),⁹ or that election records or results be provided in a specific, unalterable format (the Secretary already chooses the format for election results).¹⁰ Indeed, local officials currently base their returns off of the “tally tapes” produced by the optical scanner.¹¹ These practices and statutes merely fill in the procedural gaps and align with constitutional purposes. As long as the Secretary’s role in receiving and processing the records and returns from local officials remains ministerial, there is no constitutional concern. *See Opinion of the Justices*, 815 A.2d at 797.

II. The Act must be upheld because it can be implemented under existing election procedures and settled constitutional expectations.

The Act does not conflict with the procedural requirements and purposes described above. In fact, the Deputy Secretary notes that the Act “did not amend any of the statutory provisions governing how municipal officials handle ballots, count votes, and prepare and submit election returns,” Flynn Aff. ¶ 19, and the Senate concedes the same, *see* Br. of the Senate, at 10. As the Senate points out, the Act “simply supplement[s] existing statutory language with the additional direction that, for offices covered by the [Act], ‘the Secretary shall tabulate the votes according to’” the RCV method. *Id.* That is because the Act can be

⁹ Br. of League of Women Voters, at 19 n.8.

¹⁰ Flynn Aff. ¶ 9.

¹¹ *Id.* ¶ 12.

implemented pursuant to the statutory regime *that is already in place*.¹²

Consistent with the practices described above, in an election using RCV, local officials can use optical scanners and tally tapes to conduct and declare their counts before delivering an electronic election record (sometimes called a “cast vote record” or “CVR”) to the Secretary for tabulation.¹³ Meanwhile, hand-count jurisdictions can manually prepare a table of results for the Secretary, or officials from these towns can conduct and declare their counts using a scanner in a neighboring municipality before delivering their electronic election results to the Secretary.¹⁴ These changes would alter only the *format* of the results and the *method* of tabulation conducted by the Secretary after all votes have been received, counted, and declared by local officials.¹⁵ The political branches may believe these changes are cumbersome, costly, or inconvenient, but those policy questions have already been weighed—and decided—by the voters, in favor of RCV.

¹² Gary Bartlett of the Ranked Choice Voting Resource Center has evaluated the Deputy Secretary’s affidavit and determined that it “describes election administration law and practices in Maine with sufficient detail to determine that [RCV] . . . can be implemented . . . without any changes to existing state law and few changes in existing procedures.” See Attached Affidavit of Gary Bartlett [hereinafter, “Bartlett Aff.”] ¶ 6.

¹³ See Bartlett Aff. ¶ 12. It is hard to imagine the Constitution precluding the production of computerized election results by local officials, given that voting machines were explicitly added to the Constitution. See Me. Const. art. II, § 5 (“Voting machines, or other mechanical devices for voting, may be used at all elections under such regulations as may be prescribed by law . . .”).

¹⁴ See Bartlett Aff. ¶¶ 14, 15.

¹⁵ The Senate argues that the word “count” in § 723-A(2) has “constitutional significance” and means that the duties of local election officials have been reassigned to the Secretary. Hardly. First, the Secretary’s tabulation has *always* involved counting. See *Tabulate*, Merriam-Webster Dictionary (2011) (“to put into tabular form”; “*to count*, record, or list systematically”) (emphasis added). The constitutional issue is whether the Secretary’s role is ministerial or discretionary. Second, this context-free theory of interpretation likely would surprise the drafters of several statutes. Compare 17-A M.R.S. § 207-A (describing the criminal offense of “domestic violence assault”) with U.S. Const. art. IV, § 4 (requiring the United States to protect the States against “domestic violence”).

III. The Act must be upheld because it can be implemented using new election procedures to comply with stricter constitutional demands.

As the Senate concedes, the Act does not include any implementation details beyond referring to existing statutory procedures. This admission conclusively demonstrates that the present facial challenge must fail unless it would be *impossible* to implement the Act in a manner that is consistent with constitutional requirements. *See Dorr v. Woodard*, 140 A.3d 467, 473 (Me. 2016). None of the briefs show this to be the case. The Legislature itself possesses the authority to amend the election code, and there are several options available if the Senate believes new procedures are required.

For example, if the Legislature believes that using an electronic election return is problematic (despite maintaining the Secretary's strictly ministerial role), it is possible for *all* local officials to prepare hard-copy lists of results using a tally table similar to the example provided in Exhibit A. For machine-count jurisdictions, this would require updated software so that tally tapes provide the number of each rank-order permutation (and not just the number of preferences rankings received by each candidate). Local officials could then use this more detailed tally tape to prepare paper election returns, just as they do today. This would provide all of the information the Secretary needs to conduct the tabulation.

For the reasons stated above, FairVote does not believe that a reasonable interpretation of the Constitution makes this necessary. The lists should not need

to be in paper form, and the Secretary should not be precluded from the ministerial act of uploading an electronic election results file. Nonetheless, the Justices need not even reach these questions. The only question the Justices need to answer, given the facial challenge before them is whether generating such comprehensive paper election returns is *impossible*. It is not.

The Deputy Secretary makes a conclusory assertion that, “[t]o implement § 723-A(2), [electronic images of] the ballots cast for all defeated candidates *must be re-examined*” and that “[i]t is *not possible* to perform the task of redistributing second or third choice[s] . . . based on review of the election returns . . . [e]ven if our office were to modify the forms.”¹⁶ That is demonstrably false.

It is true that the “cast vote record” is an electronic record of all votes cast and that using this digital record is far more efficient (and reliable) than preparing a hard-copy record. This efficiency and reliability explains why optical scanners were adopted in the first place. Yet, the bare claim that it is *impossible* for local officials to create a hard-copy record (either by hand or by requesting updated software that generates a more comprehensive tally tape) is factually incorrect and disregards the high burden facing those who allege that “no set of circumstances exists under which the Act would be valid.” *Dorr*, 140 A.3d at 473 (quoting *United States v. Salerno*, 481 U.S. 739, 745 (1987)).

¹⁶ See Flynn Aff. ¶¶ 22, 23 (emphasis added).

Again, the Secretary may believe that preparing a paper election return that lists the number of times each rank-order permutation occurs would be more “unwieldy”¹⁷ than using electronic election records—and FairVote does not disagree¹⁸—but that does not make the Act *unconstitutional*. Quite the contrary. The efficiency and reliability gained by using an electronic record helps prevent “fraud and mistake” and demonstrates why the term “list” should be “accorded a liberal interpretation” to encompass electronic election records.

In short, the Act can be implemented under the existing election code, and the Legislature possesses the power to authorize new statutory procedures if it believes otherwise. Regardless, constitutionally compliant implementation options exist and, therefore, the present facial challenge to the Act must fail.

CONCLUSION

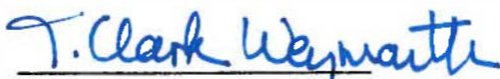
As the Senate eloquently notes, “the drafters of the Constitution understood that, for a representative democracy, loss of public confidence in the electoral process was a peril of the first order.” Br. of the Senate, at 11. The People of Maine expressed their loss of confidence in the electoral process last November and voted to implement a system that more faithfully reflects their will. The irony of arguing that these efforts should be smothered in order to *restore* confidence in government seems to have been lost on those challenging the initiative results.

¹⁷ See *id.* ¶ 30.

¹⁸ See Bartlett Aff. ¶ 14 (noting that “generat[ing] an election record [in hard copy] analogous to a[n] [electronic election record] . . . would be time-consuming, but feasible if required by law”).

Opponents of RCV may allege it is cumbersome, complex, or impracticable, “but what have all these to do with the Constitution?” *Johnson v. City of N.Y.*, 9 N.E.2d 30, 38 (N.Y. 1937). The voters have made their voices heard, and unless the Justices “can put [their] finger upon the very provisions of the Constitution which prohibit [the Act],” there is no reason to silence them. *Id.* For the foregoing reasons, FairVote respectfully asks the Justices to uphold the Act.

Respectfully submitted,



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March 17, 2017

Exhibit A


1st Choice	2nd Choice	3rd Choice	Tally	
Coulter, Charlotte	Depaul, Mildred	Harris, Edward		
		None		
	Harris, Edward	Depaul, Mildred		
		None		
	No 2nd choice			
Depaul, Mildred	Coulter, Charlotte	Harris, Edward		
		None		
	Harris, Edward	Coulter, Charlotte		
		None		
	No 2nd choice			
Harris, Edward	Coulter, Charlotte	Depaul, Mildred		
		None		
	Depaul, Mildred	Coulter, Charlotte		
		None		
	No 2nd choice			
Undervote (no candidates ranked)				

For ballots containing write-ins, skipped rankings, or overvotes, please use the back of this form.

1st Choice	2nd Choice	3rd Choice	Tally
Spoiled ballot (unable to interpret)			

State of Maine Sample Ballot
General Election, November 8, 2016
for
Augusta W1 –1, Augusta W2, Augusta W4 –2

Instructions to Voters

To vote for the candidate of your choice, fill in the oval to the left like this: 

To vote for a Write-in candidate, fill in the oval to the left of the Write-in space and write in the person's name.

To have your vote count, do not erase or cross out your choice.

If you make a mistake, ask for a new ballot.

President/Vice President

Statewide
Vote for ONE (1)

☐ Clinton, Hillary Rodham
Kaine, Timothy Michael
Democratic

☐ Johnson, Gary
Weld, Bill
Libertarian

☐ Stein, Jill
Baraka, Ajamu
Green Independent

☐ Trump, Donald J.
Pence, Michael R.
Republican

☐ Write-in

Instructions to Voters: Ranked Choice Voting

- Rank candidates in order of your choice. You may rank as many or as few candidates as you choose.
- Your 2nd, 3rd, and other choices will not count against your 1st choice. They will only be considered if your 1st choice does not win.

- Fill in the oval: In the 1st column for your first (1st) choice.
In the 2nd column for your second (2nd) choice.
In the 3rd column for your third (3rd) choice, and so on.

- To vote for a Write-in candidate, fill in the oval of the column of your choice and write in the name below "Write-in."

- To have your vote count, do not erase or cross out your choice. If you make a mistake, ask for a new ballot.

**U.S. Senator**

Statewide

Rank up to 6 candidates.
Mark no more than 1 oval in each column.

Crane, Ichabod
City
Party

Lantern, Jack O.
City
Party

Patch, Pumpkin
City
Party

Stein, Frank N.
City
Party

Ween, Hal O.
City
Party

Write-in

1st Choice

2nd Choice

3rd Choice

4th Choice

5th Choice

6th Choice

Rep. to Congress

District 1

Rank up to 6 candidates.
Mark no more than 1 oval in each column.

Duck, Daisy
City
Party

Duck, Donald
City
Party

Goof, Goofy
City
Party

Mouse, Mickey
City
Party

Mouse, Minnie
City
Party

Write-in

1st Choice

2nd Choice

3rd Choice

4th Choice

5th Choice

6th Choice

Governor

Statewide

Rank up to 6 candidates.
Mark no more than 1 oval in each column.

Adams, John
City
Party

Jefferson, Thomas
City
Party

Madison, James
City
Party

Monroe, James
City
Party

Washington, George
City
Party

Write-in

1st Choice

2nd Choice

3rd Choice

4th Choice

5th Choice

6th Choice

State Senator

District 15

Rank up to 6 candidates.
Mark no more than 1 oval in each column.

Breyer, Stephen
City
Party

Ginsberg, Ruth Bader
City
Party

Kennedy, Anthony
City
Party

Roberts, John
City
Party

Thomas, Clarence
City
Party

Write-in

1st Choice

2nd Choice

3rd Choice

4th Choice

5th Choice

6th Choice

Rep. to the Legislature

District 85

Rank up to 6 candidates.
Mark no more than 1 oval in each column.

Blake, Daphne
City
Party

Dinkley, Velma
City
Party

Doo, Scooby
City
Party

Jones, Fred
City
Party

Rogers, Shaggy
City
Party

Write-in

1st Choice

2nd Choice


3rd Choice

4th Choice

5th Choice

6th Choice

Instructions to Voters

To vote for the candidate of your choice, fill in the oval to the left like this: 

To vote for a Write-in candidate, fill in the oval to the left of the Write-in space and write in the person's name.

To have your vote count, do not erase or cross out your choice.
If you make a mistake, ask for a new ballot.

Sheriff
Kennebec County
Vote for ONE (1)

☐ Mason, L. Kenneth, III
Readfield
Independent

☐ Reardon, Ryan P.
Oakland
Democratic

☐ Write-in

County Commissioner
Kennebec District 1
Vote for ONE (1)

☐ Crockett, Patsy A.
Augusta
Democratic

☐ Pare, Jeremy Adam
Manchester
Independent

☐ Write-in

Turn Over
Questions on Back

State of Maine Sample Ballot
Referendum Election, November 8, 2016

Instructions to Voters

Fill in the oval next to your Yes or No choice, like this: ☒
To have your vote count, do not erase or cross out your choice.
If you make a mistake, ask for a new ballot.

Question 1: Citizen Initiative

Do you want to allow the possession and use of marijuana under state law by persons who are at least 21 years of age, and allow the cultivation, manufacture, distribution, testing, and sale of marijuana and marijuana products subject to state regulation, taxation and local ordinance?

☐ Yes

☐ No

Question 2: Citizen Initiative

Do you want to add a 3% tax on individual Maine taxable income above \$200,000 to create a state fund that would provide direct support for student learning in kindergarten through 12th grade public education?

☐ Yes

☐ No

Question 3: Citizen Initiative

Do you want to require background checks prior to the sale or transfer of firearms between individuals not licensed as firearms dealers, with failure to do so punishable by law, and with some exceptions for family members, hunting, self-defense, lawful competitions, and shooting range activity?

☐ Yes

☐ No

Question 4: Citizen Initiative

Do you want to raise the minimum hourly wage of \$7.50 to \$9 in 2017, with annual \$1 increases up to \$12 in 2020, and annual cost-of-living increases thereafter; and do you want to raise the direct wage for service workers who receive tips from half the minimum wage to \$5 in 2017, with annual increases until it reaches the adjusted minimum wage?

☐ Yes

☐ No

Question 5: Citizen Initiative

Do you want to allow voters to rank their choices of candidates in elections for U.S. Senate, Congress, Governor, State Senate, and State Representative, and to have ballots counted at the state level in multiple rounds in which last-place candidates are eliminated until a candidate wins by majority?

☐ Yes

☐ No

Question 6: Bond Issue

Do you favor a \$100,000,000 bond issue for construction, reconstruction and rehabilitation of highways and bridges and for facilities, equipment and property acquisition related to ports, harbors, marine transportation, freight and passenger railroads, aviation, transit and bicycle and pedestrian trails, to be used to match an estimated \$137,000,000 in federal and other funds?

Total estimated life time cost is \$133,000,000 representing \$100,000,000 in principal and \$33,000,000 in interest (assuming interest at 6.0% over 10 years).

☐ Yes

☐ No

Turn Over
Candidates on Front

**AFFIDAVIT OF GARY BARTLETT,
DIRECTOR, RANKED CHOICE VOTING RESOURCE CENTER**

I, Gary Bartlett, being duly sworn, declare as follows:

1. From 1993 to 2013, I was Executive Director of the North Carolina State Board of Elections. My responsibilities generally covered administration of primary and general elections in North Carolina, including matters such as voter registration, precinct changes, campaign finance, and any other duties that the Board gave me.
2. During my tenure as Executive Director of the State Board of Elections, I was involved in many organizations that advance the effective administration of elections nationwide. I was an active member in the National Association of State Election Directors (better known as NASED). I am a former board member and lifetime member of the Election Center, an association of election officials from across the United States and parts of Canada who get together to help resolve election issues and explore new ways of administering elections. I have also been involved with the Election Center's National Task Force on Election Reform (from 2000 to 2002), and was the national co-chair for three years of the National Task Force on Elections Accessibility. I served on the Federal Elections Commission Advisory Panel and the Standards Board of the United States Election Assistance Commission.

3. During my time as Executive Director of the State Board of Elections, the Legislature established opportunities for pilot uses of ranked choice voting. We helped two cities use it in 2007 and 2009. We also ran four judicial vacancy elections with ranked choice voting, including one statewide election.

4. We learned that we would need to conduct the first statewide ranked choice voting election 86 days prior to the scheduled election date. No funds were budgeted for it at the state or county level. The election was successful. Our analysts concluded ranked choice voting worked as intended. Exit surveys conducted in ranked choice voting pilot cities by North Carolina State University found that voters by large percentages preferred it to their former system.

5. The Ranked Choice Voting Resource Center is a project established by FairVote. It consists of a group of election administration experts from across the country with hands-on experience running elections, examining how best to run ranked choice voting elections. We maintain a website at www.rankedchoicevoting.org that provides a compilation of best practices and first-hand experiences from jurisdictions using ranked choice voting. Our services are available as a free resource for voters, election administrators, policymakers, and candidates.

6. The affidavit of Julie L. Flynn, attached to the brief of Secretary of State Janet T. Mills, along with its accompanying exhibits, describes election

administration law and practices in Maine with sufficient detail to determine that ranked choice voting, as described in the Act to Establish Ranked Choice Voting, 21-A M.R.S.A. § 723-A, can be implemented in ways consistent with the Maine Constitution without any changes to existing state law and few changes in existing procedure.

7. Following implementation of ranked choice voting, ballots can still be prepared by the Election Division, in paper form, and distributed to the municipalities. Affidavit of Julie L. Flynn, at ¶ 5. Ballots can still be laid out precisely, with timing marks along the edge, to ensure that the scanning devices in the machines “read” the ovals marked by the voters. This is performed automatically by ES&S software, and our staff has created a sample ballot following ES&S procedures that includes both ranked and unranked contests for demonstration purposes (Exhibit B).¹ *Id.* at ¶ 8.

8. The Secretary of State can still design and print “uniform tabulation sheets” as required by 21-A M.R.S.A. § 695(5) customized for each jurisdiction to reflect the correct listing of candidates and offices. *Id.* at ¶ 9.

9. The Secretary can still tabulate the election returns from all 500 municipalities and submit the tabulation to the Governor within 20 days after the

¹ The model ballot follows ES&S practices for ranked ballots. Because it was not generated by the ES&S software, it does not include timing marks. It shows a ballot with the non-ranked presidential race as well as two local races, and ranked choice voting contests for all offices if exactly five candidates ran for each contest.

election. That timeframe, comparable to most states, provides sufficient time to complete the ranked choice voting tabulation. *Id.* at ¶ 15.

10. The tabulation of *final* results will not begin until after the Elections Division has received all election returns from the municipal officials. *Id.* at ¶ 20. However, tabulation of, and public release of, preliminary ranked choice voting results without all election returns is possible; in fact, it is common practice in jurisdictions using ranked choice voting.

11. The initial number of first choices can be tabulated and released exactly as results are under the prior single-choice voting system. For all contests in which a candidate has more than half of the votes in that initial count, no further tabulation is needed, due to provisions in the Act that allow for bulk elimination of candidates who cannot possibly win. § 723-A (4)(B).

12. For contests that require multiple rounds of tabulation, the tabulation can be performed using the “cast vote record” (CVR) files exported from existing DS-200 tabulators or from high speed DS-850 tabulators. A CVR is an electronic record of each voter’s ranked choices. *Flynn Aff.*, at ¶ 24. A CVR for a ranked choice voting contest can also be converted into a list of the total number of ballots with each ranking order permutation, and such a list would be sufficient for conducting the round-by-round tabulation once aggregated with the lists from each municipality.

13. For municipalities that already have at least one DS-200 tabulator, the affidavit of Julie L. Flynn describes how each tabulator can export a CVR onto a memory device, and each device can then be delivered to a central location to be tabulated. *Id.* at ¶¶ 25-27.

14. It is possible to generate an election record analogous to a CVR by hand counting. Doing so would involve creating a list of each ranking order that appears on the ballots counted in the municipality (Exhibit A). Brief of League of Women Voters of Maine and Maine Citizens for Clean Elections, at 19. The affidavit of Julie L. Flynn notes that doing so would be difficult on account of the large number of possible permutations involved, Flynn Aff., at ¶ 30, but that would be mitigated by the likelihood of some strings commonly recurring, as well as the small number of voters in the hand counting towns. *Id.* at ¶ 7, n. 1 (noting that 232 of the 237 hand counting towns have fewer than 1,000 enrolled voters). Such a procedure would be time-consuming, but feasible if required by law.

15. Another option for hand counting towns would be for the counting team from each such town to travel with the ballots from that town to the nearest municipality that has a DS-200 tabulator and to scan the ballots there. This approach would not require leasing or purchasing any new tabulators, either in towns or in Augusta. Although this approach would require greater exploration in detail, it appears that the average distance between any hand counting town and its

closest neighbor with a DS-200 tabulator is currently about 11 miles (the farthest would be about 50 miles from Moose River to Greenville), and the total number of miles traveled if every hand counting town needed to travel to its closest neighbor with a DS-200 tabulator and return would be about 4,200 miles total.²

16. Additionally, the option discussed in the affidavit of Julie L. Flynn of leasing a single high speed tabulator and delivering ballots (perhaps accompanied by the counting team for each town) to a secure, central location in the capitol area is feasible. *Id.* at ¶ 28. According to testimony provided by Julie L. Flynn to the Joint Standing Committee on Veterans and Legal Affairs on May 6, 2013, a four-year lease of a DS-850 tabulator with appropriate software would cost \$73,444. This option would also incur the cost of delivering ballots from hand counting towns to Augusta using procedures already in place for recounts.

17. Once the ranking data from each municipality's CVR has been collected and uploaded, conducting the round-by-round tabulation is straightforward. In Minneapolis, election administrators (using the same ES&S equipment used in Maine) do this manually using Microsoft Excel. In North Carolina, election officials used custom software that was developed by staff at the

² These estimates used data from 427 of Maine's 500 municipalities. It did not include townships or plantations, instead assuming the average travel distance for those jurisdictions would be about the same as other municipalities. It also did not consider the impact on towns where officials would need to cross water to get to the nearest town with a DS-200 tabulator. Regardless, this very rough estimate does demonstrate that this procedure could be much less expensive than delivering all ballots from hand counting jurisdictions to Augusta.

Board of Elections and tested by ES&S and labs at North Carolina State University. In Portland, election officials used open source software called Choice Plus Pro in 2011 and election officials would have used the same software in 2015 with CVRs exported by the DS-200 machines had the mayoral contest not been decided in the initial round.

18. The fiscal note attached to the affidavit of Julie L. Flynn, Flynn Aff., at Ex. L, included costs that may not need to be incurred. It includes the cost “to print an additional ballot page,” but the example ballot we provide in Exhibit B demonstrates that all contests can often fit on a single page. It also includes costs to “lease additional ballot tabulating machines,” to “purchase additional memory devices,” and to “lease a high-speed vote tabulating unit,” all of which may be eliminated or mitigated by the process described in paragraph 15 above. It also lists about \$149,000 in costs associated with delivering ballots from hand counting towns to Augusta, which can also be significantly mitigated as described in footnote 2 below. The state would incur some transportation costs, as well as costs associated with updating the ballot tabulating machines, but many other costs can likely be significantly reduced.

After being duly sworn, I declare under penalty of perjury of the laws of the State of Maine that the above and foregoing representations are true and correct to the best of my information, knowledge, and belief.

3/16/17

Date

Gary O. Bartlett

Signature

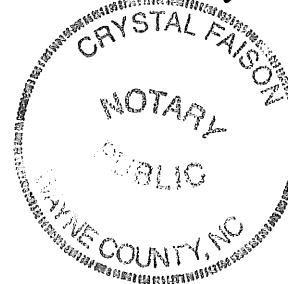
STATE OF NORTH CAROLINA

WAYNE COUNTY

I, the undersigned Notary Public, do hereby affirm that Gary Bartlett personally appeared before me on the 16th day of March 2017, and signed the above Affidavit as his free and voluntary act and deed.

Crystal Faison

Notary Public / Attorney



My Commission Expires Nov. 28, 2021